

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**FERMIN CORTEZ, *et al.*, on behalf of
themselves and all other similarly
situated individuals,**

Plaintiffs,

v.

**NEBRASKA BEEF, INC., and
NEBRASKA BEEF, LTD.,**

Defendants.

8:08CV90

**DAVID CHUOL, on behalf of himself
and all other similarly situated
individuals,**

Plaintiff,

v.

NEBRASKA BEEF, LTD.,

Defendant.

8:08CV99

**PLAINTIFFS' MOTION FOR
SANCTIONS**

Pursuant to the Court's May 6, 2011 Order, Plaintiffs, through their undersigned counsel, respectfully move this Court for sanctions under Federal Rule of Civil Procedure 37 or the Court's inherent powers, against Defendants Nebraska Beef, Inc. and Nebraska Beef, Ltd. (collectively "Nebraska Beef" or "Defendants").

This case was originally scheduled for trial on January 31, 2011. On January 12, 2011, less than three weeks before trial, Nebraska Beef produced thousands of pages of documents,

called Sanitation Standard Operating Procedures Checklists (“SSOP Checklists”), which it had never produced or identified during discovery. Nebraska Beef claimed that the SSOP Checklists, purported to list the first and last stun times in Nebraska Beef’s Slaughter division and the first and last index times in its Fabrication division. These times are relevant to the time that Nebraska Beef’s production line runs, and were critical to Nebraska Beef’s defenses in this case. In fact, Nebraska Beef’s expert, Dr. Jeffrey Fernandez, based a supplemental analysis on the times listed in those documents. The Court postponed the January 31, 2011 trial and set a new trial date for May 2, 2011, in order to permit Plaintiffs to conduct limited discovery regarding the late-produced documents.

Plaintiffs’ subsequent investigation uncovered overwhelming evidence that Nebraska Beef engaged in a willful and systematic abuse of the discovery process, including:

- (1) Concealing production of the SSOP Checklists to Plaintiffs’ detriment during the discovery period;
- (2) Lying under oath regarding the existence of the SSOP Checklists; and
- (3) Fabricating critical information contained in the SSOP Checklists.

When trial finally began on May 2, 2011, Plaintiffs were prepared with substantial evidence to attack the credibility of the SSOP Checklists. When the SSOP Checklists were introduced during the hostile direct examination of Nebraska Beef’s current Superintendent of the Slaughter Department and former Hazard Analysis Critical Control Points Plan (“HACCP”) Coordinator, Lisa Cleary, Ms. Cleary surprised the parties by stating that, although she was familiar with the SSOP Checklists, she had never seen them with the stun and index times listed on the documents – the very same times that Nebraska Beef claimed were critical to its defenses.

When confronted with this inconsistency, rather than own up to its discovery violations, Nebraska Beef instead opted to introduce yet *another* set of previously undisclosed documents,

titled SSOP Operational Sanitation Checklists (the “Cleary Sanitation Checklists”). Both the SSOP Checklists and the Cleary Sanitation Checklists were responsive to multiple specific requests made by Plaintiffs during discovery, but neither sets of documents had been produced during the discovery period. Subsequently, Nebraska Beef’s former counsel moved to withdraw from the lawsuit altogether, and for a mistrial. Ultimately, the Court had no choice but to declare a mistrial, and the Court, the jury, and Plaintiffs were forced into a *second* disruption of trial. Plaintiffs have now been for to prepare for trial twice, and both times trial has been postponed because of Nebraska Beef’s willful discovery misconduct.

Plaintiffs now move and respectfully request that the Court impose sanctions on Nebraska Beef for its willful abuse of the discovery process, including violations of Fed. R. Civ. P. 26(a) and 26(e), lying under oath, and fabrication of evidence. Due the egregiousness of Nebraska Beef’s conduct, Plaintiffs respectfully submit that the only appropriate sanction is for the Court to impose a default judgment against Nebraska Beef in favor of Plaintiffs, and to strike Nebraska Beef’s Answer. In addition, Plaintiffs respectfully request that the Court issue an order requiring Nebraska Beef and/or Nebraska Beef’s former counsel, Lamson, Dugan and Murray, LLP, to pay as a sanction, at the very least, all attorneys’ fees and costs incurred by Plaintiffs as a result of Nebraska Beef’s intentional, discovery-based misconduct, beginning on January 12, 2011, the date the fabricated SSOP Checklists were produced.

Plaintiffs’ Motion for Sanctions is supported by the accompanying Memorandum of Law in Support of Plaintiffs’ Motion for Sanctions, the Declaration of Carolyn H. Cottrell (“Cottrell Declaration”) and attached exhibits, the pleadings and papers on file in this action, and any other

submissions or arguments of counsel as may be presented to the Court.

Dated: June 6, 2011

Respectfully submitted,

s/ Carolyn H. Cottrell
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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel for Defendants:

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Dated: June 6, 2011

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